

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

APPELLANT'S BRIEF AND APPENDIX

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 9262

450

JOHN C. ALLEN, JR., Infant, by JOHN K.
CUNNINGHAM, Guardian *Ad Litem*,
Appellant

VS.

ALEXANDER M. HERON, *Appellee*

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF COLUMBIA

JOHN K. CUNNINGHAM
Investment Building
Washington, D. C.
Attorney for Appellant

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.
CHARLES W. WARDEN, WASHINGTON REPRESENTATIVE,
TOWER BUILDING

*United States Court of Appeals
for the District of Columbia*

FILED MAY 21 1946

Joseph W. Stewart

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BRIEF FOR APPELLANT

Jurisdictional Statement

This appeal is from a final judgment of the Probate Division of the District Court of the United States for the District of Columbia, dated January 28, 1946 (Appt.'s App. 9) admitting to probate and record, over appellant's protest, the last Will and Testament of John C. Allen, dated December 30, 1942. (Appt.'s App. 1-2.)

The jurisdiction of the District Court was conferred by the District of Columbia Code (1901), S. 117, and the jurisdiction of the United States Court of Appeals for the District of Columbia is conferred by S. 226 of the same code.

Question Presented

This appeal presents for decision the question whether the birth of issue effects, by operation of law, the revocation of a man's will, made subsequent to his marriage but prior to the birth of his child, which will disposed of his entire estate without making any provisions for, or mentioning in any manner, his child.

Statement of Case

The facts of this case are simple and undisputed. The testator, John C. Allen, was married on May 10, 1942. His only child, the appellant, was born on February 22, 1945. The testator died on August 21, 1945.

Approximately seven (7) months after his marriage and two (2) years before the birth of his child, John C. Allen made his will, dated December 30, 1942, whereby he left his entire estate to his wife. That will made no provision for any issue that might afterwards be borne to the testator, nor did it mention his son in any manner, (Appt.'s App. 1-2).

Allen's estate consists of personal property with an estimated value of \$1315.88, and real property with an assessed value for tax purposes of \$19,025.00, subject to encumbrances of \$13,478.22. His debts are estimated to be \$1,000.00 (Appt.'s App. 3-4).

Following Allen's death his executor offered his will for probate and record. The Court appointed John K. Cunningham as guardian *ad litem* for the infant heir, John C. Allen, Jr., who opposed the probate of the will upon the ground that its revocation was effected by the birth of issue subsequent to the execution of the will, which made no provision for, or mentioned in any manner, this issue. (Appt.'s App. 6-7.)

The applicable provision of the Code of the District of Columbia (1940) is Title 19, Section 103, which reads, *inter alia*:

“And, moreover, no devise or bequest, or any clause thereof, shall be revocable otherwise than by some other will or codicil in writing or other writing declaring the same, or by burning, canceling, tearing, or obliterating the same by the testator himself or in his presence and by his direction and consent; but all devises and bequests shall remain and continue in force until the same be burned, canceled, torn, or obliterated by the testator or by his direction in the manner aforesaid, or unless the same be altered or revoked by some other will, testament or codicil in writing, or other writing of the testator signed in the presence of at least ~~two~~ ^{two or more} witnesses attesting the same, any former law ~~of average~~ to the contrary notwithstanding.”

Summary of Argument

By its decision in the case of *Pascucci v. Alsop*, 79 App. D. C. 354, 147 F. (2d) 880 (1945), this court opened for this jurisdiction the entire field of revocation of wills by operation of law.¹

As a result thereof, this Court has two possible courses of action it may follow in deciding the case at bar:

1. It may affirm the pristine common law rule, in the absence of legislative change of that rule by the Congress, that the will of a married man was not revoked by subsequent birth of issue. That rule is generally said to rest upon the presumption that the birth of issue subsequent to his will was a circumstance that the testator expected and in contemplation of which his will was made²; or

2. It may recognize that “modern changes in family law have largely swept away the bases for these so-called com-

¹ Mersch, Implied Revocation of Wills Revived in the District of Columbia, 33 Georgetown L. J. 182, 184 (1945).

² Page states this presumption is “probably false far more frequently than it is true,” 1 Page, Wills (3 ed. 1941), Note 2, Section 514.

mon law rules''³, and adopt the nearly universal American rule, that the birth of issue to a married man, following the execution of his will, which does not provide for that issue, either revokes the will by operation of law or provides that the afterborn child shall take as though the testator shall have died intestate.

This Court should follow the modern rule because:

1. It is rational and just to the afterborn child. The common law rule is neither.

2. It is the law in forty-six (46) states⁴, including Maryland (provided the afterborn child is unprovided for and his brothers are provided for in the will), nearly universally by statute.

Argument

(a) Common Law Rule

At common law the birth of a child did not of itself revoke by operation of law a will previously executed by its parent, nor did an afterborn child possess any rights in the testator's estate prejudicial to the devisee⁵. Concurrence of marriage and birth of issue subsequent to the execution of the will were required for the common law courts to find that a man's will was impliedly revoked by operation of law⁶. This Court adopted the latter rule in its decision in the case of *Pascucci v. Alsop*, 79 App. D. C. 354, 147 F. (2d) 800 1945). There was, however, no occasion for the Court in the case of *Pascucci v. Alsop* to pass upon the common

³ Mechem and Atkinson, Cases and Materials on Wills and Administration (2d ed. 1939), Note 10, at 325.

⁴ Mathews, Pretermitted Heirs; An Analysis of Statutes, 29 Columbia L. Rev. 748 (1929); Annotated Code of Maryland (1939) (Flack) Article 93, Sec. 338.

⁵ I Page, Wills (3 ed. 1941) Sec. 525; *Doe d. White v. Barford*, 4 M. & S. 10, 105 Eng. Rep. 739 (1815).

⁶ Chancellor Kent in *Brush v. Wilkins*, 4 Johns. Ch. 506, 518 *et seq.* (N. Y. 1820); Rood, Wills (2d ed. 1926) Sec. 381; Sec. 378 Note 2.

law rule as to the effect of the birth of a child alone upon the validity of its parent's will executed prior to its birth.

The reasons for the common law rule that the birth of a child did not alone revoke a will earlier executed by its parent are not convincing. One such reason, which is credited to Lord Mansfield, rests upon a presumption that a married man in executing his will reasonably contemplates the possibility of a child being thereafter born to him, and his failure to provide for that child in his will must be viewed in light of that knowledge. In short, that failure is presumed deliberate. This presumption, as Page points out⁷, is "probably false far more frequently than it is true." Such a conclusion is in concord with our common experience. We recognize that a man's will reflects the marital, financial, family relationships and other important circumstances existing at the time he makes his will. Certainly the "ordinary, reasonable man" intends that his will shall be modified to give effect to any changes of a serious nature, including the birth of children, which may occur in those circumstances. Concededly, such changes, because of inertia, procrastination, and other causes, are not always made; but the intention to make them exists at the time the will is executed. One commentator states that when a testator has no children living at the time of making his will, as was the fact situation in the case at bar, he is less likely to anticipate and provide for a prospective child than when he has such children "living, recognized and present in his mind at the time"⁸.

Another theory, distinct from that of Lord Mansfield's, for the common law rule that a will executed prior to the birth of issue was not revoked by virtue of such birth is at-

⁷ I Page, Wills (3 ed. 1941) Note 2, Sec. 514.

⁸ Mathews, Pretermitted Heirs; An Analysis of Statutes, 29 Columbia L. Rev. 748, 760, 761, N. 52, 761.

tributed to Lord Kenyon⁹. That theory rests upon the ground that there was a tacit condition annexed to the will when made that it should not take effect if there should be a total change in the situation of the testator's family. The application, at common law, of this theory so as to reach the conclusion that marriage coupled with birth of issue was such a "total change"; but that birth of issue, presumably without regard to whether that issue consisted of a single child or a dozen children, was not alone a "total change", is illogical and is unfair to the pretermitted¹⁰ heirs. This in effect was the conclusion of the District Court (Supreme Court of the District of Columbia) in the sole case in which this issue has been presented in this jurisdiction¹¹.

The practical effect of the common rule, whatever the juridical theory upon which it rests, that the birth of a child did not *per se* revoke the previously executed will of its parent, was to disinherit the child. No provision was made at common law, unlike the Roman law¹² for the afterborn child to share in the estate of his testator parent. This consequence of the common law rule upon the economic status of the afterborn child, which in recent years is presumed to be contrary to the testator's intent¹³, has led to its nearly universal abandonment in American jurisdictions, almost exclusively through statutory enactments.

(b) Statutes which Change the Common Law Rule

The common law rule that the birth of a child to a testator did not revoke its parent's will executed prior to its birth

⁹ *Karr v. Robinson*, 167 Md. 375, 173 Atl. 784 (1934); ~~173 Atl. 584 (1934)~~.

¹⁰ "To pretermitt is to pass by, to omit, to disregard. If the intention to exclude appears upon the face of the will, the child has not been omitted or passed by." *Allison v. Allison*, 101 Va. 537, 569; 44 S. E. 905, 915 (1903).

¹¹ *In re Estate of Mary D. Heyl*, 30 Wash. Law Rep. 246 (Sup. Ct. D. C. 1902).

¹² 2 Sherman, *Roman Law in the Modern World* (2d ed. 1922) 263.

¹³ Mathews, *Pretermitted Heirs; An Analysis of Statutes*, 29 Columbia L. Rev. 748, 749.

has been nearly universally modified in American jurisdictions. Only two states and four federal jurisdictions have not effected such modifications by statute¹⁴.

In general, these statutes provide that in the case of a valid will followed by birth of issue unprovided for in the will the afterborn child takes by inheritance the portion of his parent's estate, both real and personal, that he would have taken had his parent died intestate. The child concerned in these statutes is typically afterborn, including posthumous. "Variations include (a) prior children, (b) a distinction among afterborn children in respect to whether a prior child was living or not at the time of the execution of the will, (c) children absent and reported dead, and (d) special provisions dealing with posthumous children alone. The typical effect is partially intestacy, occasionally total intestacy or revocation. The typical estate is in fee simple, with a variation in the form of a special limitation. Avoidance of this effect is normally by three means, (a) provision in the will, (b) provision outside of the will (usually by settlement), and (c) an intent to disinherit, normally appearing from the will. Regulatory provisions are provided in the form of a right to contribution from the beneficiaries under the will in proportion to the value of their shares, with a variation of 'abatement' and contribution 'in kind or money'. Normally no device for realizing this right is expressed, with a few statutes naming tribunals as having jurisdiction."¹⁵

The common policy supporting these various statutes is a legislative desire to prevent inadvertent disinheritance. That is, "to guard and provide against such testamentary thoughtfulness and lack of vision as prevent a testator from

¹⁴ Mathews, *Pretermitted Heirs; An Analysis of Statutes*, 29 Columbia L. Rev. 748, 749; *Annotated Code of Maryland* (1939) (Flack), Article 93, Sec. 338.

¹⁵ 29 Columbia L. Rev. 748, 778, 779.

contemplating the possibility of afterborn children and taking such possibility into account in framing a scheme for the testamentary disposition of his property." *McLean v. McLean*, 207 N. Y. 365, 371, 101 N. E. 178, 179 (1913.) Presumably, under this policy, a parent desires to provide for his issue. "The likelihood that issue subsequent to the will was unforeseen, otherwise it would have been provided for, leads a solicitous legislature to do what it believes would have been desired had the true circumstances been known. It is a statutory revival of the old common law theory of so-called revocation by circumstances on the basis of presumed intent, applied to a situation not within the common law rule. On the contrary, that it is not an embodiment of that later theory of 'tacit condition' independent of intent, is evident from the prominence and effectiveness given an intent to disinherit under these statutes."¹⁶

(c) Judicial Decisions which Change the Common Law Rule

As previously pointed out, the common law rule, that the birth of a child did not revoke by operation of law the will of its parent executed prior to its birth, has been changed by statute in forty-six states. Accordingly, there has been little room for modification of the common law rule by judicial decision. Yet, there are several notable decisions which hold in effect that the common law rule as interpreted in other jurisdictions conflicts with modern family and social relationships, and in which the courts holding to that view have declined to give that rule the application it is given in other jurisdictions.

The first of these cases to be considered is that of *Karr v. Robinson*, 167 Md. 375, 173 Atl. 584 (1934). This decision

¹⁶ 29 Columbia L. Rev. 748, 750.

of the Maryland Court of Appeals was in a case involving the identical question as presented by the case at bar, and involving the same statute, with minor changes, as the applicable provision of the District Code (1940) (Title 19, Section 103).

There the testator executed his will after the death of his first wife and after his second marriage, but before the birth of any children by his second wife. He died four years after making his will. He was survived by two children by his first wife, his second wife and a child by the second wife, with another child expected shortly. His will devised and bequeathed all of his property in trust, one-third for the benefit of his surviving wife and one-third for the benefit of each of his two daughters by the earlier marriage.

The widow individually and as next friend of her child filed a caveat on the ground that there had been a total change in the situation of the testator by the birth of one child and the strong probability that another would be born, and that therefore, by said change in the status of the family, the alleged will had been revoked impliedly and by operation of law.

Apparently there was attached to the Robinson's will and introduced in evidence a letter written by the testator about six months prior to his death listing certain changes he desired made in his will. One of these changes provided for the inclusion of "another heir", the child of his second marriage.

The Orphans' Court of Harford County, Maryland, refused to admit the will to probate. The Executor, who was also the guardian of the two children by the first marriage, appealed. The Maryland Court of Appeals recognized that the sole question was "whether the subsequent birth of a child alone without a subsequent marriage was sufficient to revoke the will." It answered this question in the affirmative.

The decision quotes from *Baldwin v. Spriggs*, 65 Md. 373, 5 Atl. 295 (1886) and reviews the bases upon which the doctrine there announced rested. The Court decided in *Baldwin v. Spriggs*, that the will of a testator executed after his marriage and birth of issue, was revoked by the subsequent marriage and birth of child, in the absence of any provision in the will for the children of the subsequent marriage. The opinion (in *Karr v. Robinson*) emphasizes that Lord Kenyon rested the rule upon the ground that there was "a tacit condition annexed to the will when made that it should not take effect if there should be a total change in the situation of the testator's family." The relative rights of the widow and the child born subsequent to the execution of the will were considered and emphasis laid upon the fact that the widow's rights at common law had been greatly enlarged and extended by statute so that now she might take as an heir of her husband as well as contract with her husband at the time of marriage for the payment of an additional amount. Contrariwise, a child for whom no provision was made in the will was neither in a position to contract with his parent nor did the law make any provision for him in that situation. And should such child receive nothing from his parents' estate, the child "is deprived of the moral obligation due him from the parent to provide for him upon the parents' death." The Court found it illogical and unreasonable "to hold under the circumstances that the wrong done to the subsequently born child cannot be righted unless it be shown that the marriage of the parents was subsequent to the will, a fact of little or no import as affecting the rights of the wife or mother." *Karr v. Robinson*, 167 Md. 375, 380, 381.

In support of this conclusion the Court referred to the case of *Johnston v. Johnston*, 1 Phillimore 447, (1817) decided by the Ecclesiastical Court in 1817, which held that a

will may be revoked by the birth of a child alone without the concurrence of a subsequent marriage.

The opinion, after referring to the fact that although it was generally held that marriage and birth of a child subsequent to the execution of a will are sufficient to revoke the will by implication, subject to certain exceptions, noted that the authorities were not in accord whether the concurrence of both such facts is essential. The Court then said:

“In most of the states, statutes have been passed relative thereto. In this state, no such statute has been passed, nor has there been any case before this Court where this question has been raised upon facts similar to those in this case * * * and hence we are at liberty to follow either line of decisions, and, as those holding that the concurrence of the facts named are not essential appear to us to be most logical, we will hold that the will, in this case, was impliedly revoked.” *Karr v. Robinson*, 167 Md. 375, 382, 383.

Following the decision of its Court of Appeals, the Legislature of Maryland enacted the following statute:

“A will shall be revoked by the subsequent marriage of the testator coupled with birth, adoption, or legitimation of a child by him. No will shall be revoked merely by subsequent birth, adoption or legitimation of a child by the testator; provided, however, that if a will provides for an existing child or children but makes no provision for a child subsequently born, adopted or legitimated by the testator, then any such child subsequently born, adopted or legitimated shall be entitled to the same share of the estate, real and personal, which it would have taken if the testator had died intestate, provided such child born, adopted or legitimated by the testator shall survive such testator. This section shall apply to the estates of all persons dying on or after June 1, 1937, but not to estates of any persons dying prior to that date.” Article 93, Section 338, Annotated Code of Maryland (1939) (Flack).

This act adopts the decision of the Court of Appeals in *Karr v. Robinson* under the special facts of that case, namely a will which provided for existing children but did not

provide for subsequently born children. The act prohibits the revocation of a will by the subsequent birth of issue alone. In this respect it is contrary to the principle urged for adoption by this Court in this case. And it is likewise contrary to the general weight of authority. The Maryland legislature did, however, in this statute recognize that the pristine common law rule that a child born subsequent to a will did not revoke that will by operation of law was outmoded. In that view the Maryland legislature is supported by similar action by nearly every State legislature. It elected to confine its modification of that rule to circumstances which it believed created a stronger presumption of the testator's intent not to disinherit his child, that the mere birth of that child standing alone, namely the failure to provide for subsequently born children after having provided for children born prior to the making of the will. In confining its modification of the common law rule to those particular circumstances, the Maryland legislature followed a small minority of the other State legislatures.

The action of the Maryland legislature in ratifying the decision of the Maryland Court of Appeals that the pristine common law rule as to the revocation of a will by the subsequent birth of a child is no longer the law of that State is the important conclusion to be drawn from the statute in issue. The conditions which the legislature placed upon its ratification of the change in that rule, even though one such condition embraces the issue at bar, is of lesser import.

The only case in this jurisdiction which presented the legal question in issue is that of *In the Matter of the Estate of Mary D. Heyl*, 30 Wash. Law Rep. 246 (Sup. Ct. D. C. 1902).

There, the testatrix was twice married. By her first husband she had three children. After his death, she married his brother; and while pregnant by him, she made her will, thereby disposing of nearly all her property. She

provided for the three children by her first marriage, and then added this provision:

“Item VI. In the event of another child being born to me, I desire it shall have one-fourth ($\frac{1}{4}$) interest in my Turner Real Estate Co. stock, but shall not share in my other interests. I make this distinction because it will be provided for in part by its father, whereas the three children, Julia, Edward and Helen, by my first husband, have only me to depend upon.”

About five months after making her will the testatrix gave birth to two children, died about six weeks thereafter, without changing her will, and leaving her husband and five children surviving her.

The Court stated the issue as follows:

“This case presents the question as to what extent if at all, is the will of a married woman revoked by the subsequent birth of a child, which is not mentioned or provided for in the will?” 30 Wash. Law Rep. 296.

The Court, through Mr. Justice Barnard, recognized that in many cases it has been held that marriage and birth of a child will be such a change of circumstances as will revoke the will of the father made before marriage, citing *Baldwin v. Spriggs*, 65 Md. 373; 5 Atl. 295 (1886). It noted that other cases hold that the birth of a child alone, with other circumstances, after a will is made, if the same is not anticipated or referred to in the will is a sufficient change of circumstances of the testator's family to revoke the will by implication, citing *McCullum v. McKenzie*, 26 Iowa 510 (1868); *Negus v. Negus*, 46 Iowa 487 (1877); *Johnston v. Johnston*, 1 Phillimore 447, and other cases. Contrary to this holding, the Court cited *Brush v. Wilkins, et al.*, 4 Johns Ch. 506. The essence of the Court's decision is contained in these passages:

“The question seems to be a novel one in this District, and this court is, therefore, not directly bound by authority or precedent, but must decide the matter as reason and best judgment may dictate. * * *

There would seem to be no difference in principle, in the change of circumstances by marriage and birth of children, and in the change of circumstances by birth of children alone * * *. It seems to me that the change in the situation of the family of the testatrix by the birth of the additional child, under all the circumstances of this case, is such a change as would revoke the previous will by implication, under the principle stated. The will is not to speak under any circumstances until the death of the testatrix but if such change in the situation of the family takes place before the death, the tacit condition annexed is to be read, and then the will never speaks at all * * *. Many of the states have statutes which protect the children left unprovided for by will under such circumstances as those shown in this case; but as there is no such statute in this district, the common law rule must govern." 30 Wash. Law Rep. 296, 297, 298.

In *McCullum v. McKenzie*, 26 Iowa 510 (1868), the testator devised his property to his wife and sister under a will made fifteen years before his death and eighteen months before the birth of his only child, who survived him together with his wife.

In its opinion the Supreme Court of Iowa said:

"The question made is certain and single, presenting the simple inquiry whether the subsequent birth of the son, without any fact or circumstances, operated to revoke this will. * * *. The authorities are in conflict. Indeed, there is a strange want of authority upon the precise question involved. The great controversy in the early history of the ecclesiastical courts, was whether the subsequent marriage and the birth of a child would operate to revoke, first as to personality, then, as to realty. * * *. Some of the cases, perhaps, say that marriage alone will not have this effect, while more that the rule that birth will not. But it is astonishing how often it occurs that the latter proposition is announced in cases where it was entirely unnecessary to pass upon the question. A striking instance of this is found in the leading case in this country of *Brush v. Wilkins* (4 Johns Ch. 506). * * *. The statutes adopt,

almost uniformly, the rule of the civil law, declaring the revocation following to be partial or total. * * *

This legislation attests the struggle to which we have referred, and the conviction of the popular and legislative will, that the so-called rule of the common law was unjust, harsh and inconsistent with the rights of children; frequently, if not uniformly defeating the will and purpose of the father. In this country, all the children, by our laws of descent, are substituted for the sole heir. This is the policy of this, and we believe, all the States. The common law heir was not to be disinherited, except by express devise, or by implication so unmistakable that an intention to the contrary could not be supposed. * * *

It is in accordance with the uniform, if not universal observation of all, that a parent of sound mind, when left to the exercise of his own judgment, never does, without the most cogent reasons and weighty reasons—such as the gross ingratitude of a child—by his will withhold from any one of his children their due and reasonable share of his estate. If, by possibility, an instance of this kind should occur, we hesitate not to say it, it would strike every unprejudiced man as unnatural, harsh, cruel and unjust. And particularly would this be true, where, as in this instance, the child was not in being at the time of making the will. Certainly, as to a child born, as this one was, eighteen months after the testamentary act, there could be no intention to disinherit. And, surely, we need not say that the birth of this child instantly created new duties and obligations; worked such a change in the father's domestic relations as to necessarily, properly, and most reasonably influence and sway his affections and conduct and, we may add, legally operate to presumptively change his intention, in the disposition of his property, as expressed in his will. Upon this ground it was that the civil law based the rule, rather than upon a tacit condition annexed to the instrument; and the ground strikes us as being in accord with the experience of men everywhere; in harmony with the real and actual *will and purpose* of the father, and in a very large majority of, if not in all cases, with the rule as settled by the legislation of this country; and it certainly is not without support in the authorities." 26 Iowa Reports 510, 511, 512, 513, 514.

In *Negus v. Negus*, 46 Iowa 487 (1877), the rule laid down in the earlier case of *McCullum v. McKenzie*, 26 Iowa 510 (1878), was extended to cover the fact situation in that case, namely, the birth of two children, one of whom was born four years and the other six years after the execution of a will, which devised all the testator's property to his wife and failed to provide for the two children of the testator living at the time of the execution of the will. The Court here said, "A presumption of an intention to disinherit them does not arise from the disinheriting of the two older children," 46 Iowa 487, 490, after citing the cases of *Sherry v. Lozier*, 1 Bradford's Reports 451, and *Young's Appeal*, 39 Pa. State 115 (1861). In the latter case the Supreme Court of Pennsylvania said: "The principle of the common law of the revocation of wills by the subsequent birth of issue, is stated thus: If the testator's circumstances be so altered that new moral testamentary duties have accrued to him subsequent to the date of the will, such as may be presumed to produce a change of intention, this will amount to an implied revocation." 39 Pa. State 115, 119.

In *In re Lewis' Will*, 41 N. M. 522, 91 P. (2d) (1937), the Supreme Court of New Mexico held that the husband and wife, as to property rights and inheritances (except as to community property) are similarly situated. That is, upon marriage each is an heir of the other. Hence, "A will made prior to marriage by either husband or wife is revoked by marriage, because of the advent of a new heir who is entitled to share in the property of the other upon his or her decease," 41 N. M. 521, 523. By implication, the birth of a child (as an heir) would, under the doctrine of this case, revoke a will of his parent made prior to his birth, which will did not provide for the child.

In summation, it has been demonstrated that nearly every American jurisdiction has changed the common law rule

disinheriting a pretermitted heir. This change has been nearly always accomplished by legislation, which, while varying in detail, generally provides that in the case of a valid will followed by birth of issue unprovided for in the will the afterborn child takes by inheritance the portion of his parent's estate, both real and personal, that he would have taken had his parent died intestate.

The approach of the courts to the doctrine of implied revocation has been well summarized by a recent commentator as follows:

"A few courts have held that the doctrine cannot be used beyond its common law applications but the majority extend the theory to new situations. This is done on the reasoning that the doctrine is not an inflexible rule of law, limited to the two situations of marriage plus issue, or marriage alone in the case of a woman, but rather an application of a general principle that changes in the domestic situation of the testator, with their consequent creation of new social obligations, raise a conclusive presumptive of revocation. The courts frequently couch their decisions in terms of what the average testator would intend, but the basic ideas to-day seems to be the necessity of protecting an heir coming into existence after the making of the will. Thus, while the cases continue to say that marriage and birth of issue revoke a man's will (Cases cited), a few have extended the rule to the case where the marriage took place before the execution of the will with birth of issue following execution (Statute did not provide for implied revocation: *Fallon v. Chidester*, 46 Iowa 588 (1877); *Karr v. Robinson*, 167 Md. 375, 173 A. 584 (1934); contra with evident misgivings *Easterlin v. Easterlin*, 62 Fla. 468, 56 So. 688 (1911). The Florida statute did not provide for implied revocation.) This is based on the theory that the new heir should be provided for regardless of when the marriage took place, and that the presumption that the will was made in contemplation of the birth of issue is artificial." *Durfee, Revocation of Wills by Subsequent Change in the*

Condition or Circumstances of the Testator, 40 Mich. L. Rev. 406 (1942).

This approach of the courts to the doctrine of implied revocation is a healthy extension of their practice of carrying the principles incorporated in statutes of their respective jurisdictions beyond their express provisions. Thus, for example, when statutes of descent made the widow an heir of her former husband, it was held that a man's marriage alone caused implied revocation of his prior will, since by virtue of the statute he acquired not only a wife but also an heir¹⁷. This Court should enrich the common law of this jurisdiction on the doctrine of implied revocation by availing itself of the trend of legislative and judicial opinion in other jurisdictions.

Conclusion

Fortified by the nearly universal American recognition of the justice of his position, and believing that this Court will not hesitate to declare the will revoked by the subsequent birth of issue, for whom no provision in the will is made, the undersigned, as guardian *ad litem*, submits his ward's interest to the protection of this Honorable Court.

JOHN K. CUNNINGHAM,
Investment Building,
Washington 5, D. C.
Attorney for Appellant.

¹⁷ Sec. 35 Columbia L. Rev. 787, 788 for cases supporting this statement and for other examples.

APPELLANT'S APPENDIX

Case No. 9262

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 9262.

JOHN C. ALLEN, JR., Infant, by JOHN K.
CUNNINGHAM, Guardian *Ad Litem*,
Appellant

vs.

ALEXANDER M. HERON, *Appellee*

APPELLANT'S APPENDIX.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF COLUMBIA

1 **Last Will and Testament of John C. Allen.**

I, John C. Allen, of the City of Washington, District of Columbia, being of sound and disposing mind and memory, do hereby make, publish and declare this instrument to be my last will and testament.

1. I hereby direct my executor, hereinafter named, to pay all of my just debts, including the expenses of my last illness and funeral, as soon after my decease as may be practicable.

2. I give, devise and bequeath to my beloved wife, Annie Lee Allen, all my property of every kind and character, real, personal and mixed, wherever situated.

3. I hereby designate and appoint Alexander M. Heron, of Chevy Chase, Maryland, to be the executor of this my last will and testament.

IN WITNESS WHEREOF I have hereunto affixed my name and seal this 30th date of December 1942.

(s) JOHN C. ALLEN (SEAL)

Signed, sealed, published and declared by the above-named testator, John C. Allen, as and for his last will and testament, in the presence of us, who, at his request, in his presence, and in the presence of one another, have hereunto subscribed our names as attesting witnesses on the day and year last herein before written.

(s) JAYNE WHITE
506 Munsey Building
Washington, D. C.

(s) HERBERT G. PILLEN
522 Munsey Building
Washington, D. C.

(s) ANNA D. SCHULZE
6130—13th Street
Wash., D. C.

("Endorsement: Last Will and Testament of John C. Allen, deceased. Filed August 29, 1945. Victor S. Mersch, Register of Wills, D. C. Clerk of Probate Court.")

2 **Petition for Probate of Will and for Letters Testamentary.**

Petitioner, Alexander M. Heron, respectfully represents:

1. That he is a citizen of the United States and a resident of Montgomery County, Maryland, of adult age and not under any legal disability and that he makes this application as executor nominated in the will of the above named decedent.

2. That John C. Allen, late an adult citizen of the United States domiciled in the District of Columbia, died on the 21st day of August, 1945, leaving a paper in the nature of a last will and testament bearing date the 30th day of December, 1942, in which this petitioner is named as executor, which said will is now on file in the Office of the Register of Wills for the District of Columbia; that no other paper in the nature of testamentary disposition of the decedent's estate has been found, although search has been made, and this petitioner believes that the above mentioned paper is in fact the last will and testament of said decedent.

3. That said testator was survived by his widow, Annie Lee D. Allen, an adult who presently resides in Benson, North Carolina. Said testator left surviving as his heir at law and next of kin, an infant son, John C. Allen, Jr., born February 22, 1945.

3 4. At the time of his death, said testator was seized of the following real estate in the District of Columbia, which said real estate petitioner estimates to be worth about the assessed value thereof for purposes of taxation as set out opposite the description of the said property:

Square 5223, Lot 9	\$1,555.00
Square 5223, Lot 10	155.00
Square 5223, Lot 11	155.00
Square 833, Lot 31	4,697.00
Square 620, Lot 160	2,906.00
Square 4054, Lot 40	4,452.00
Square 1054, Lot 250.....	2,450.00
Square 544, Lot 115	2,655.00

The foregoing premises are subject to the following encumbrances:

Square 5223, Lots 9, 10, 11.....	\$ 785.05
Square 833, Lot 31	3,147.69
Square 620, Lot 160.....	2,206.00
Square 4054, Lot 40	2,933.55
Square 1054, Lot 250	2,426.70
Square 544, Lot 115	1,979.23

5. Said testator was possessed at the time of his death of personal property of a total estimated value of \$1,315.88, consisting of about \$315.88 in money in the Hamilton National Bank and the American Security and Trust Company, a note of the value of about \$900, and jewelry and miscellaneous household furnishings of an estimated value of \$100.00.

6. The debts of the decedent consisted principally of encumbrances upon real estate mentioned in paragraph 4 hereof, and unsecured debts including the expenses of his last illness and funeral, estimated at \$1,000.00.

4 WHEREFORE, petitioner prays,

1. That citation may issue against the above named heir at law and next of kin, and that notice by publication may issue directed to him if a return be made "not to be found."

2. That a guardian *ad litem* may be appointed to represent the infant, John C. Allen, Jr., at the hearing of the application to admit the will to probate.

3. That said will dated the 30th day of December, 1942 be admitted to probate and record as the last will and testament of the said John C. Allen, deceased, both as to real and personal property.

4. That letters testamentary issue to this petitioner as the executor named in the will.

5. And for such other and further relief as the nature of the case may require and to this honorable court shall seem proper.

(s) ALEXANDER M. HERON

HINTON & HERON,

By ALEXANDER M. HERON,

Attorney for Petitioner.

District of Columbia, ss.:

I, Alexander M. Heron, solemnly swear that I have read over the foregoing petition by me subscribed and know the contents thereof and that I verily believe the same to be true.

(s) ALEXANDER M. HERON.

Subscribed and sworn to before me

this 25th day of September, 1945.

(s) Jane Dodge,

Notary Public, D. C.

("Endorsement: Petition for Probate of Will and for Letters Testamentary. Filed October 1, 1945. Victor S. Mersch, Register of Wills, D. C. Clerk of Probate Court.")

5 **Order Appointing Guardian Ad Litem.**

It appearing to the Court by the petition of Alexander M. Heron herein filed for probate and record of the last will and testament of John C. Allen, deceased, and for letters testamentary thereon, that John C. Allen, Jr., heir at law and next of kin of said decedent, is an infant under the age of 21 years, to-wit, one year of age, and that service of process has been completed against said infant and his custodian, and that no objection has been filed, it is by the Court this 28th day of November, A. D. 1945,

ADJUDGED, ORDERED AND DECREED, that John K. Cunningham be and he is hereby appointed guardian *ad litem* for said infant to appear for and represent him at the hearing upon said petition for probate and letters testamentary with authority to file a caveat as he may be advised on behalf of said infant.

(s) JESSE C. ADKINS,
Justice.

("Endorsement: Order Appointing Guardian *Ad Litem*. Filed November 28, 1945. Victor S. Mersch, Register of Wills, D. C. Clerk of Probate Court.")

6 **Petition for Caveat by Guardian Ad Litem.**

The petition of John K. Cunningham respectfully represents to this Honorable Court:

1. That he is the duly appointed guardian *ad litem* of John C. Allen, Jr., age ten (10) months, named as heir at law and next of kin, in the petition filed herein for the probate and record of the last will and testament of his father, John C. Allen, deceased, and for issuance of letters testamentary to Alexander M. Heron, petitioner herein, and files this petition, as authorized by the order appointing him guardian *ad litem*.

2. That he has notice that a certain paper writing bearing date of December 30, 1942, has been filed in this Honorable Court as the last will and testament of said John C. Allen, deceased.

3. That the interest of said infant heir will be injuriously affected by the allowance of said pretended will, or its admission to probate; that he does hereby contest the probate and validity of said paper writing, bearing date of December 30, 1942, and purporting to be the last will and testament of John C. Allen, deceased.

4. That for the purpose of contesting the probate and validity of said paper writing, he alleges that said paper writing, bearing date of December 30, 1942, is not the last will and testament of said deceased because the infant heir was born February 22, 1945, more than two (2) years following the execution of said paper writing, which contains no provision for or mention of him; and that the birth of said infant heir subsequent to the execution of said paper writing revokes by the operation of law said paper writing as the valid and subsisting last will and testament of John C. Allen, deceased, and bars its admission to probate as said last will and testament.

5. That petitioner believes that a period of several months, or more, may elapse before a determination of the issue herein raised may be had, and petitioner accordingly states that a collector should be appointed to collect, conserve and administer upon the assets of the estate of the deceased, pending the conclusion of this litigation.

Wherefore, the premises considered, the petitioner prays:

1. That process may issue from this court requiring the parties in interest to answer the exigencies of this petition.

2. That said paper writing may be refused probate.

3. That the issue of law herein raised may be determined by this Honorable Court.

4. That a collector or collectors may be appointed to take charge of the estate of the deceased, to serve under bond until the termination of this caveat proceedings.

5. And for such other and further relief as to this Honorable Court may seem meet and proper.

(s) JOHN K. CUNNINGHAM,
Guardian Ad Litem.

District of Columbia, ss.:

I, John K. Cunningham, do solemnly swear that I have read the foregoing petition by me subscribed and know the contents thereof; that the statements therein made
8 of my personal knowledge are true, and those made as upon information and belief I believe to be true.

(s) JOHN K. CUNNINGHAM.

Subscribed and sworn to before me this 28th day of December, 1945.

(s) OLIVE E. FITZGERALD,
Notary Public, D. C.

Service acknowledged:

(s) Alexander M. Heron,
Executor, Designate

("Endorsement: Petition for Caveat by Guardian *ad Litem*. Filed December 28, 1945. Victor S. Mersch, Register of Wills, D. C. Clerk of Probate Court.")

9 **Motion to Dismiss Petition for Caveat by Guardian Ad Litem.**

The caveatee respectfully moves the court as follows:

1. To dismiss the petition for caveat filed by the guard-

ian *ad litem* of John C. Allen, Jr., because said petition for caveat fails to state a claim upon which relief can be granted.

2. To dismiss the petition for caveat filed by the guardian *ad litem* of John C. Allen, Jr. on the ground that the birth of issue of the testator subsequent to the execution of a will does not serve to revoke said will.

HINTON & HERON,
By (s) WILLIAM L. OWEN,
527 Munsey Building,
Washington 4, D. C.

I certify that I have served copies of the foregoing motion together with points and authorities attached thereto upon John K. Cunningham, Esquire, Investment Building, 15th and K Streets, N. W., Washington, D. C., by mailing the same to him at his said address this 7th day of January, 1946.

(s) WILLIAM L. OWEN.

("Endorsement: Motion to Dismiss Caveat. Filed January 7, 1946. Victor S. Mersch, Register of Wills, D. C. Clerk of Probate Court.")

10 Answer to Motion to Dismiss Petition for Caveat.

The caveator respectfully moves the court as follows:

1. To overrule the motion to dismiss the petition for caveat filed by the executor-designate, because said motion fails to state reasons which are legally sufficient to support such dismissal.

2. To overrule the motion to dismiss the petition for caveat filed by the executor-designate, because the birth of

issue of the testator subsequent to the execution of a paper writing purporting to be his last will and testament revokes by operation of law said paper writing as his valid and subsisting last will and testament.

(s) JOHN K. CUNNINGHAM,
1116 Investment Building,
Washington 5, D. C.

I certify that I have served copies of the foregoing answer, together with points and authorities attached thereto, upon Alexander M. Heron, executor-designate, Munsey Building, 1329 E Street, N. W., Washington, D. C., by mailing the same to him at his said address this 10th day of January, 1946.

(s) JOHN K. CUNNINGHAM,
Guardian Ad Litem.

("Endorsement: Answer to Motion to Dismiss Petition for Caveat. Filed January 11, 1946. Victor S. Mersch, Register of Wills, D. C. Clerk of Probate Court.")

11 Order Sustaining Motion to Dismiss Petition for Caveat.

Upon consideration of the motion to dismiss petition for caveat filed herein by the guardian *ad litem* for John C. Allen, Jr., and argument of counsel thereon, it is by the Court, this 28th day of January, 1946,

ORDERED, That the said petition for caveat be and the same hereby is dismissed.

(s) ALEXANDER HOLTZOFF,
Justice.

SEEN

(s) JOHN K. CUNNINGHAM,
Guardian ad Litem,
 Investment Building,
 15th and K Streets, N. W.,
 Washington, D. C.

("Endorsement: Order Sustaining Motion to Dismiss Petition for Caveat. Filed January 28, 1946. Victor S. Mersch, Register of Wills, D. C. Clerk of Probate Court.")

12 Order for Probate and Letters Testamentary With General Undertaking.

Upon consideration of the petition of Alexander M. Heron for probate and for letters testamentary filed herein on the 1st day of October, 1945, and upon consideration of the order passed herein on the 28th day of January, 1946, dismissing the petition for caveat filed by the guardian *ad litem* appointed herein for John C. Allen, Jr., infant heir at law and next of kin, and it appearing to the satisfaction of the court that the last will and testament of John C. Allen, deceased, bearing date the 30th day of December, 1942, has been duly proven and that process has been completed, and that the consent of Annie Lee D. Allen, widow of the deceased, has been filed herein, it is by the court this 31st day of January, 1946,

ADJUDGED, ORDERED AND DECREED, That said will be and is hereby admitted to probate and record as a will of real and personal property, and that letters testamentary are granted and shall issue to Alexander M. Heron, the executor named in said will, provided he first files his undertaking in the penal sum of Fifteen Hundred Dollars (\$1,500.00) with surety approved by the court con-

ditioned for the faithful performance of his trust and provided he files a power of attorney in compliance with Title 29, Section 88 of the Code of Laws for the District of Columbia.

(s) JESSE C. ADKINS,
Justice.

("Endorsement: Order for Probate and Letters Testamentary. Filed January 31, 1946. Victor S. Mersch, Register of Wills, D. C. Clerk of Probate Court.")

13. Petition of Guardian Ad Litem for Authority to Prosecute an Appeal From Decision Admitting Will of Testator to Probate and Record.

The petition of John K. Cunningham, Guardian *Ad Litem* for John C. Allen, Jr., an infant under 21 years of age, to wit, one year of age, respectfully represents to the Court as follows:

1. That he is the duly appointed Guardian *Ad Litem* of John C. Allen, Jr., now one year of age;
2. That as such Guardian *Ad Litem* he filed a caveat opposing the admission of a paper writing purporting to be the last will and testament of the testator, John C. Allen, to probate as a will of real and personal property;
3. That on the 28th day of January 1946, an order of this Court granting the executor's motion to dismiss said caveat was entered; on the 31st day of January 1946 an order of this Court admitting said last will and testament to probate, as a will of real and personal property, and granting letters testamentary to the executor named on the will was entered; and on the 1st day of February 1946 a general undertaking by said executor was approved by this Court;

4. That your Guardian *Ad Litem* feels that the decision of this Honorable Court, dismissing the caveat to the testator's will and admitting it to probate and record as a will of real and personal property is in error because it is directly opposed to:

a. The earlier decision of this Court in the case of *In Re Estate of Mary D. Heyl*, 30 W. L. R. 296 (1902); and

b. The decision of the Maryland Court of Appeals in the case of *Karr v. Robinson*, 167 Md. 375, 173 Atl. 584 (1934)

14. Your Guardian *Ad Litem* further feels that the direct conflict between this Honorable Court's decision in this cause, on the one hand, and its decision in the *Heyl* case and the decision in *Karr v. Robinson* by the highest court in Maryland, a jurisdiction whose probate law and decisions have special significance in this jurisdiction, on the other hand, should be resolved by the United States Court of Appeals for the District of Columbia.

5. Wherefore the premises considered your Guardian *Ad Litem* for and on behalf of this ward, John C. Allen Jr., one year of age, respectfully prays:

a. That he be authorized to prosecute an appeal to the United States Court of Appeals for the District of Columbia;

b. That the costs of such appeal be paid from the funds of the estate;

c. And for such other and further relief as to the Court seems right and proper.

(s) JOHN K. CUNNINGHAM,
Guardian *Ad Litem*,
1116 Investment Bldg.,
Washington, D. C.

John K. Cunningham, being first duly sworn, deposes and says that he has read the petition subscribed by him and knows the contents thereof; and that the matters and

things therein stated are true to the best of his knowledge and information.

(s) JOHN K. CUNNINGHAM.

Subscribed and sworn to before me this 28th day of February 1946.

(s) THOMAS C. SCALLEY,
*Deputy Register of Wills,
Clerk of the Probate Court.*

("Endorsement: Petition for Authority to Appeal by Guardian *ad Litem*. Filed February 28, 1946. Victor S. Mersch, Register of Wills, D. C. Clerk of Probate Court.")

**15 Order Authorizing Guardian Ad Litem to Prosecute
an Appeal From Decision Admitting the Will of
Testator to Probate and Record.**

Upon consideration of the petition of the Guardian *Ad Litem*, John K. Cunningham, in the above cause, for authority to prosecute an appeal from the decision rendered in this cause admitting the will of the testator to probate as a will of real and personal property, and granting letters testamentary to the executor named in said will, it is by the Court this 28 day of February 1946 ORDERED that John K. Cunningham, Guardian *Ad Litem* for John C. Allen, Jr., be and he hereby is authorized to prosecute an appeal from said order, heretofore filed in this cause on the 31st day of January 1946, the costs of said appeal to be paid from the funds of said Estate.

(s) ALEXANDER HOLTZOFF,
Justice.

("Endorsement: Order Authorizing Guardian *ad Litem* to Prosecute an Appeal from Decision Admitting Will to Probate and Record. Filed February 28, 1946. Victor S. Mersch, Register of Wills, D. C. Clerk of Probate Court.")

16 Findings of Fact and Conclusions of Law.

This cause came on to be heard at this term of Court on two motions, namely the motion of the Executor to grant the prayers of the petition and to admit the will to probate, its due execution having been sufficiently proven, and the petition for caveat of John C. Allen, Jr., by his Guardian *Ad Litem*, John K. Cunningham, to deny probate of the will, and the same having been considered the Court upon the record finds:

1. That John C. Allen, a citizen of the United States and a resident of the District of Columbia, died on the 21st day of August 1945.

2. That John C. Allen left a will dated the 30th day of December 1942, which, after having directed the payment of all his debts, devised to his wife, Annie Lee Allen, all his property of every kind and character, real, personal and mixed, wherever situated; and that this will does not recognize or provide for John C. Allen, Jr.

3. That the testator was married to Annie Lee Allen, and she survived him.

4. That issue, John C. Allen, Jr., was born to the testator and Annie Lee Allen on the 22nd day of February 1945, survived the testator, and is approximately one (1) year of age.

5. That the testator did not make another will after the aforesaid birth of his child, and said will is his Last Will and Testament.

17 6. That the testator's estate within the District of Columbia consists of:

(a) Real Property as listed below, together with its assessed value for purposes of taxation:

Square 5223, Lot 9	\$1565.00
Square 5223, Lot 10	155.00
Square 5223, Lot 11	155.00
Square 833, Lot 31	4697.00
Square 620, Lot 160	2906.00
Square 4054, Lot 40	4452.00
Square 544, Lot 115	2655.00

The foregoing premises are subject to the following encumbrances:

Square 5223, Lots 9, 10, 11	\$ 785.05
Square 833, Lot 31	3147.69
Square 620, Lot 160	2206.00
Square 4054, Lot 40	2933.55
Square 1054, Lot 250	2426.70
Square 544, Lot 115	1979.23

The current worth of the foregoing real property is believed to exceed by a substantial amount of money the difference between its assessed value and the encumbrances thereon.

(b) Personal Property of an estimated value of \$1315.88.

18

CONCLUSIONS OF LAW.

At Common Law a Will was revoked by a marriage taking place subsequent to its execution if the marriage was followed by birth of issue. On the other hand, at Common Law a will was not revoked by birth of issue subsequent to the execution of the will if marriage had taken place previous to its execution.

In the case of *Pascucci v. Alsop*, 79 US App. D. C. 354, 73 Wash. Law Rep. 367, the United States Court of Appeals for the District of Columbia held that the Common Law rule, that a will is revoked in the event marriage and birth of issue occur subsequent to its execution, was and is the

law of the District of Columbia. It seems to me that this case emphasizes the proposition that the Common Law rule prevails in the District of Columbia. It follows thence that the Common Law rule that a will is not revoked by birth of issue subsequent to the execution of the will, the marriage having taken place previous to the execution thereof, is still the law of this jurisdiction.

I am fully aware of the arguments of policy that would impel a change in this rule of law. Many states have changed it by legislation. Congress, however, has not seen fit to do so for the District of Columbia. As a *nisi prius* judge, in the absence of a change of law, either by legislation or by a decision of the Supreme Court of the United States or of the United States Court of Appeals for the District of Columbia, I am not at liberty to modify what I deem to be the existing law on the subject, irrespective of whether I may believe it to be unfortunate. Petition for caveat dismissed.

(s) ALEXANDER HOLTZOFF.

14 day of March, 1946.

("Endorsement: Findings of Fact and Conclusions of Law. Filed March 14, 1946. Victor S. Mersch, Register of Wills, D. C. Clerk of Probate Court.")

**21 Points Relied Upon by John K. Cunningham on His
Appeal From the Final Judgment of
January 31, 1946.**

1. The birth of issue to the decedent subsequent to the execution of his will, which does not provide for or recognize his issue, operated as a revocation of his will.

2. The decedent died intestate, and the testamentary paper, dated December 30, 1942, is without legal efficacy owing to the birth of issue to the decedent subsequent to the execution of his will, which does not provide for or recognize his issue.

3. The statutory law of the District of Columbia (D. C. Code 1940, Title 19, S 19-103) does not supersede or abrogate the ecclesiastical law, and should be construed in accordance with modern legislative and judicial authority, which hold that birth of issue to the decedent subsequent to the execution of his will, which does not provide for or recognize his issue, effects the revocation of such a will.

4. The Court erred:

- (a) In admitting to probate and record decedent's testamentary paper dated December 30, 1942, as his last will and testament;
- 22 (b) In not adjudging that the birth of issue to the decedent subsequent to the execution of his will, which does not provide for or recognize his issue, operated as a revocation of his will, dated December 30, 1942;
- (c) In not adjudging that the decedent died intestate;
- (d) In dismissing appellant's petition for caveat which was based upon the proposition that the will became revoked by operation of ecclesiastical law and by the weight of modern legislative and judicial authority upon the birth of issue to the decedent subsequent to the execution of his will, which does not provide for or recognize his issue.

JOHN C. ALLEN, JR.,

By (s) JOHN K. CUNNINGHAM,
Guardian ad Litem.

Service of copy hereof
is hereby acknowledged
this 14th day of March, 1946.

(s) ALEXANDER M. HERON.

("Endorsement: Points Relied Upon on Appeal. Filed March 15, 1946. Victor S. Mersch, Register of Wills, D. C. Clerk of Probate Court.")

**23 Motion to Vacate Order of February 28, 1946,
Authorizing Prosecution of Appeal.**

Comes now Alexander M. Heron, Executor in the above entitled proceeding, and moves the Court to vacate the order of February 28, 1946, authorizing the guardian *ad litem* to prosecute an appeal from the order dismissing his petition for caveat entered on January 31, 1946 and for grounds of his said motion states:

1. That the said order of February 28, 1946 was entered without notice to the Executor and without notice of the filing of the petition whereon it was based.

2. The total costs, including counsel fees, upon such an appeal may amount to as much as \$750 or \$1,000.

3. That the sole beneficiary of the estate is the widow of the decedent and the mother of the infant involved, and that the incurring of these costs will be to the detriment of the infant since they must be borne out of the net estate to which his mother is entitled.

4. That, in the opinion of the executor, the net value of the estate is approximately \$15,000.00, a sum obviously inadequate to support the widow and the infant child until the latter reaches maturity.

5. And other matters appearing on the face of the record.

HINTON & HERON,
By (s) WILLIAM L. OWEN,
527 Munsey Building,
Washington 4, D. C.

24 I certify that I served a copy of the foregoing motion with its attached points and authorities by mailing the same to John K. Cunningham, Esquire, Investment Building, 15th and K Streets, N. W., Washington, D. C., this 20th day of March, 1946.

(s) WILLIAM L. OWEN.

("Endorsement: Motion to Vacate Order of February 28, 1946, authorizing Prosecution of Appeal. Filed March 21, 1946. Victor S. Mersch, Register of Wills, D. C. Clerk of Probate Court.")

25 Answer to Motion of Executor to Vacate Order of February 28, 1946, Authorizing Prosecution of Appeal.

Comes now, John K. Cunningham, Guardian *ad Litem*, in the above entitled proceedings, and moves the Court to dismiss the motion of the Executor, Alexander M. Heron, to vacate the order entered by this Court on February 28, 1946, authorizing said John K. Cunningham, as Guardian *ad Litem*, to prosecute an appeal to the United States Court of Appeals for the District of Columbia, from the order of this Court, dated January 31, 1946, admitting the testator's will to probate and granting letters testamentary to the Executor, and in support of this motion states:

1. That there is involved in this proceeding a substantial issue of law, namely, whether or not the birth of the infant, John C. Allen, Jr., subsequent to the execution of the testator's will, which did not mention or provide for said infant, revoked by operation by law testator's will, thereby vesting in said infant the testator's estate subject to the widow's dower rights. This Court, by its order of February 28, 1946, recognized the existence, and importance of the resolution, of that issue.

2. That the grounds upon which the Executor's motion to vacate the order of February 28, 1946, are based are legally insufficient for this Court to vacate said order.

26 3. And other matters of record.

(s) JOHN K. CUNNINGHAM,
Guardian ad Litem.

I certify that I served a copy of the foregoing motion, together with its attached points and authorities, by mailing the same to Alexander M. Heron, Esquire, Munsey Building, 1329 E Street, N. W., Washington 4, D. C., this 25th day of March, 1946.

(s) JOHN K. CUNNINGHAM,
1116 Investment Building,
Washington 5, D. C.

("Endorsement: Answer to Motion to Vacate Order of February 28, 1946. Filed March 25, 1946. Victor S. Mersch Register of Wills, D. C. Clerk of Probate Court.")

27 Order Denying Motion to Vacate Order Authorizing Appeal.

Upon consideration of the motion of the Executor, Alexander M. Heron, to vacate the order entered by this Court on February 28, 1946, authorizing John K. Cunningham, as Guardian *ad Litem*, to prosecute an appeal to the United States Court of Appeals for the District of Columbia, from the order of this Court, dated January 31, 1946, admitting the testator's will to probate and granting letters testamentary to the Executor, it is by the Court this 4 day of April, 1946,

ORDERED, That said motion to vacate said order of February 28, 1946, be and the same hereby is denied.

(s) ALEXANDER HOLTZOFF,
Justice.

SEEN

(s) ALEXANDER M. HERON,
Executor,
Munsey Building,
Washington, D. C.

("Endorsement: Order Denying Motion to Vacate Order Authorizing Appeal. Filed April 4, 1946. Victor S. Mersch, Register of Wills, D. C. Clerk of Probate Court.")

BRIEF FOR APPELLEE

IN THE

United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 9262

*United States Court of Appeals
for the District of Columbia*

FILED JUN 10 1946

JOHN C. ALLEN, JR., Infant, by JOHN K.
CUNNINGHAM, Guardian Ad Litem, *Appellant*.

Joseph W. Starnes
CLERK

v.

ALEXANDER M. HERON, Executor, *Appellee*.

Appeal From an Order of the District Court of the United
States for the District of Columbia.

WILLIAM L. OWEN,
Munsey Building,
Washington, D. C.,
Attorney for Appellee.

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IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 9262.

JOHN C. ALLEN, JR., Infant, by JOHN K.
CUNNINGHAM, Guardian Ad Litem, *Appellant*,

v.

ALEXANDER M. HERON, Executor, *Appellee*.

**Appeal From an Order of the District Court of the United
States for the District of Columbia.**

BRIEF FOR APPELLEE.

COUNTER-STATEMENT OF CASE.

This case comes before this Court on appeal from an order of the District Court of the United States for the District of Columbia, dated January 31, 1946 (Appt.'s App. 11-12), admitting to probate and record the will of John C. Allen, deceased, and granting letters testamentary to Alexander M. Heron, executor-designate. This order was

predicated upon an order by the court below (Appt.'s App. 10-11) dismissing a petition for caveat filed by the guardian ad litem of John C. Allen, Jr., infant son of the testator (Appt.'s App. 6-8).

No evidence has been taken in the case, the matter being disposed of in the lower court by motion to dismiss the petition for caveat (Appt.'s App. 8-9).

John C. Allen, a married man, domiciled in the District of Columbia, properly executed a will on December 30, 1942 (Appt.'s App. 1-2; 3; 15). By the terms of the will all of testator's property was left to his wife (Appt.'s App. 1-2; 15). Thereafter a son, John C. Allen, Jr., was born to the testator on February 22, 1945 (Appt.'s App. 3; 6; 15). Testator died on August 21, 1945, leaving his afore-said wife and infant son surviving him (Appt.'s App. 3; 15).

On October 1, 1945, the executor designated in the will filed a petition for its probate and the issuance of letters testamentary to him in the District Court of the United States for the District of Columbia (Appt.'s App. 3-5). John K. Cunningham was appointed guardian ad litem of John C. Allen, Jr., on November 28, 1945 (Appt.'s App. 6), and thereafter filed a petition for caveat on the ground that the birth of the son subsequent to the execution of the will revoked the will by operation of law (Appt.'s App. 6-8). The executor-designate filed a motion to dismiss this petition, which motion, after oral argument, was granted by order of the court of January 28, 1946 (Appt.'s App. 8-10). The order admitting the will to probate and granting letters testamentary followed on January 31, 1946 (Appt.'s App. 11-12).

SUMMARY OF ARGUMENT.

By the common law rule the subsequent birth of a child does not revoke a will made after marriage. Nor is there any statutory authority in the District of Columbia providing otherwise. The only statute in this District which relates to the revocation of wills is a virtual reenactment of the Sixth Section of the English Statute of Frauds. This

section provides that no devise or bequest may be revoked except by specific methods named, and these do not include changes in family situation. At common law no exception was read into this section to enable the mere birth of issue to constitute a revocation of a will. This section should be here interpreted in accordance with the construction placed upon it by the common law courts.

Departure from the common law rule would cause confusion and uncertainty in the law of wills in this jurisdiction.

ARGUMENT.

I. Birth of a Child Does Not Revoke a Will Made After Marriage at Common Law.

The ecclesiastical courts first held that certain changes in a testator's family circumstances gave rise to a presumption that he intended revocation of his will. I Page, Wills (3d ed. 1941) Sec. 487-8. From this presumption of intent to revoke arose the common law doctrine of implied revocation by certain changes in family circumstances. *Brady v. Cubitt*, 1 Dougl. 31; I Page, *op. cit. supra* Sec. 507, 515. This doctrine grew from a presumption into a set of rules of substantive law. *Marston v. Fox*, 8 Ad. & El. 14; I Page, *op. cit. supra* Sec. 509. The common law courts, even after the enactment of the Statute of Frauds in 1676, held that certain changes in family situation constituted implied revocations of wills. In these cases, the question was not whether revocation would occur through change in family circumstances. That it would was well settled. Rather, the question in each case was *what changes in family circumstances would serve to revoke a will previously made?*

It was universally held at common law that the birth of a child did not revoke a will made subsequent to marriage, since a man must be presumed to have contemplated the possibility of offspring, once he was married. Such a change did not, therefore, constitute an implied revocation. *Shepherd v. Shepherd*, 5 T. R. 51; *Wellington v. Wellington*,

4 Burr. 2155 (obiter); *Doe v. Barford*, 4 M. & S. 10, 1 Page, *op. cit. supra*, Sec. 514, 525; Atkinson, Wills (1st ed. 1937), Sec. 166; Rood, Wills (2d ed. 1926), Sec. 381; I Schouler, Law of Wills, Executors and Administrators (6th ed. 1923), Sec. 643; see *Brush v. Wilkins*, 4 Johns. Ch. (N. Y.) 506. Similarly, marriage of a testator subsequent to the execution of a will did not revoke the will. *Wellington v. Wellington*, *supra*; *Brush v. Wilkins*, *supra*; 1 Page, *op. cit. supra*, Sec. 510.

However, the common law rule was different where *both* marriage and the birth of a child intervened between the execution of the will and death. Despite the apparent blanket prohibition against revocation by any means other than the methods enumerated in the Statute of Frauds, the common law courts consistently held that implied revocations of wills were not within the Statute of Frauds. So the question in each factual situation became whether a given set of circumstances operated as an implied revocation at common law. Where *both* marriage and the birth of a child occurred after the execution of the will, implied revocation occurred, the theory being that the testator's change in circumstance was so complete that he could not have meant his prior will to stand. *Brady v. Cubitt*, *supra*; *Marston v. Fox*, *supra*; *Brush v. Wilkins*, *supra*; also see *Coulam v. Doull*, 133 U. S. 216, 33 L. Ed. 596. He now owed loyalty to a completely different class of persons. This change, therefore, constituted an implied revocation, and, as such, survived the enactment of the Statute of Frauds, such implied revocations being read into the statute.

That this was a judicial exception read into the Statute of Frauds can hardly be disputed. The common law courts never specifically labeled it as such, but, in justifying such revocation, they considered that a "tacit condition" was "annexed" to each will, to the effect that if certain changes occurred, the will would be revoked. *Doe v. Lancashire*, 5 T. R. 49.

Since every manner of revocation was prohibited by the Statute of Frauds unless accomplished by the specified

methods or implied revocation—the method read into the Statute—, and since mere birth of a child did not constitute an implied revocation of a will, the Statute of Frauds prohibited revocation in this situation.

II. No Statutory Authority Exists in the District of Columbia Which Provides for the Revocation of Wills by Birth of Issue.

In most American jurisdictions, the common law rule that birth of a child does not revoke a will made after marriage has been modified or abrogated by statutes superseding the Sixth Section of the Statute of Frauds and the common law. These statutes have taken varying forms—most, however, providing basically that children born after the execution of a will take as if by intestacy.¹

The Congress has not seen fit to pass any such statute in this jurisdiction.

III. In the Absence of Statutory Authority Providing for the Revocation of Wills by the Birth of Issue, the Common Law Rule Controls.

The common law rule that birth of a child does not of itself serve as a revocation of a will made by the testator after marriage has been recognized by the highest courts of various states, and applied in the absence of statutes specifically changing the rule. *Easterlin v. Easterlin*, 62 Fla. 468, 56 So. 688; *Ellis v. Ellis*, 2 De Sauss, Eq. (S. C.) 556; see *Wood v. Treadway*, 111 Va. 526, 69 S. E. 445; *Woodliff v. Dunlap*, 187 Ala. 255, 65 So. 936; *In re Rendell's Estate*, 244 Mich. 197, 221 N. W. 116.²

¹ Mathews, *Pretermitted Heirs; An Analysis of Statutes*, 29 Columbia L. Rev. 748 (1929).

² Statutes have now been passed in each of these five jurisdictions, modifying or abrogating the common law rule. The important fact is that practically all American jurisdictions have applied the common law rules strictly up until the time that their legislatures have enacted a specific statute changing it.

In *Easterlin v. Easterlin*, supra, the court said at page 471:

“... We have no statute concerning the matter, as have many of the States, consequently we are relegated to the common law. . . .”

Until recently the Iowa courts alone had seen fit to reject the common law rule without aid of statute.

The Maryland decisions had always strictly followed the common law rules as to implied revocations, both in the case where birth of issue alone occurred after the making of a will and in the case where marriage and birth of issue occurred subsequently. *Baldwin v. Spriggs*, 65 Md. 373, 5A, 295; *Massey v. Massey's Lessee*, 4 Harris & Johns' (Md.) 141. However, in *Karr v. Robinson*, 167 Md. 375, 173A. 584, decided by the Maryland Court of Appeals in 1934, the court departed from the established rule. In that case the testator made a will providing for his second wife and two children by a previous marriage. Subsequent to the making of the will the testator had a child by his second wife. At the time of his death the birth of another child was expected shortly. About six months before his death the testator wrote the draftsman of his will, listing changes he wished made in his will, one of which was the inclusion of the child of his second marriage as a beneficiary. The appealing circumstances of the testator having written his desire to have this other child included, along with his second wife and two children by a previous marriage, may have weighed heavily on the Court's conscience. At any rate, the Maryland Court of Appeals treated this case in accordance with the common law rule as to marriage and birth of issue *both* occurring after the execution of the will, and held the will revoked. The language of the decision clearly rejected the common law rule that birth of a child does not revoke the testator's will. That the Maryland legislature did not approve of the reason and sweeping language of this excursion by its Court of Appeals into judicial legislation is apparent. In 1937 it passed a statute

reinstating the common law rule that birth of issue did not revoke a will made subsequent to marriage, unless the will had provided for an existing child or children.¹ Under the Maryland statute the afterborn children in *Karr v. Robinson* would take as if by intestacy, but the will in the case at bar would remain undisturbed.

Appellant has cited *In re Estate of Mary D. Heyl*, 30 Wash. Law Rep. 246 (Sup. Ct., D. C., 1902) as local authority for the revocation of wills by the subsequent birth of issue. That case did not present the usual situation where the testator failed to provide for children born subsequent to the execution of his will. Rather, in that case, an expected child was provided for in the will. Instead of one child, twins were born. Particularly in view of the fact that children by a previous marriage had been also provided for in the will, ambiguity and practical impossibility of rational interpretation of the change in favor of the afterborn children had resulted. The Court held the will revoked, resting its decision on the doctrine of revocation by change in family situation. In its opinion the Court overlooked entirely the application of the Statute of Frauds. The proper interpretation of this statute has been determined by this Court, in the only cases involving revocation by change in family circumstances to come before it, to be the decisive factor. Without the limitations prescribed by the statute, some less difficulty might be encountered by any court in establishing a new set of rules on this subject. The *Heyl* case is indeed an anomaly. So far as counsel can determine, it has never been cited in judicial decision or text book.² In view of the courts' ignoring the statute, which is the principal concern in these cases, the *Heyl* case is without value.

¹ Annotated Code of Maryland, 1939, Article 93, Sec. 338 (Flack).

² Mr. Mersch, however, in his article, *Implied Revocation of Wills Revived in the District of Columbia*, 33 Georgetown L. J. 182 (1945), cited the *Heyl* case in a footnote on p. 187.

IV. The Statutory Provision Governing the Revocation of Wills in the District of Columbia Should be Interpreted in Accordance with the Construction Placed Upon the Sixth Section of the English Statute of Frauds by the Common Law Courts Prior to the Revocation, and by the Maryland Courts Prior to February 27, 1801.

The District of Columbia Code (1940), Title 19, Sec. 103 provides that no devise or bequest may be revoked except by (1) another will or codicil, (2) burning, (3) cancelling, (4) tearing, or (5) obliterating, and concludes with:

“... any former law or usage to the contrary notwithstanding.”

This section is in all material respects identical with the Maryland law as it existed in 1801, from which it was taken, and the Sixth Section of the English Statute of Frauds, from which the Maryland law was taken. *Pascucci v. Alsop*, 79 U. S. App. D. C. 354, 147 F. (2d) 880. No other statute dealing with the revocation of wills has ever been passed in this jurisdiction.

The applicable canon of construction is set forth in *McDonald v. Hovey*, 110 U. S. 619, 28 L. Ed. 269, at page 628 of the U. S. Report:

“... That where English Statutes, such, for instance, as the Statute of Frauds and the Statute of Limitations, have been adopted into our own legislation, the known and settled construction of those statutes by courts of law has been considered as silently incorporated into the Acts, or has been received with all the weight of authority. . . .”

And in *Coulam v. Doull*, *supra*, it was said on page 233 of the U. S. Report:

“The rule ordinarily followed in construing statutes is to adopt the construction of the courts of the country by whose Legislature the statute was originally adopted. . . .”

In *Strasburger v. Dodge*, 12 App. D. C. 37, this Court, in interpreting an act relative to voluntary assignments substantially like an Illinois statute, adopted the construction of the statute by the Illinois courts, saying, at page 48:

“According then, to the familiar rule in respect of the adoption, without material change, of the statute of another State, namely, that it must be taken, together with such interpretation as it shall have received from the courts of that State, before its said adoption, our duty would seem to be perfectly clear. . .”

and then again, on page 50:

“In consideration of the foregoing premises, we are forced to the conclusion that if Congress had intended to repudiate the construction that the statute had received in the State from which it was adopted, it would have made some corresponding changes in the language used, so as to remove all doubt in respect of its intention. . .”

* * * * *

“Under all the circumstances, we do not feel that we would be justified in going beyond the interpretation that has been given this statute by the Supreme Court of Illinois. To do so would savor too much of judicial legislation.”

This Court, in *Pascucci v. Alsop*, supra, held, with regard to the statute we are here considering, that it was to be guided by the construction of such provision by the courts of England and the courts of Maryland.

This section should here again be interpreted in accordance with the construction placed upon it by the English courts prior to the Revolution and by the Maryland courts prior to the Act of 1801.¹

¹ By the organic Act of 1801, approved February 27, 1801 (2 Stat. L. 103, ch. 15), the District of Columbia adopted the then existing laws of the State of Maryland, which included the British statutes in effect in 1776, and the common law as it existed in 1776.

V. The D. C. Code Prohibits Revocation of Wills by Operation of Law Except Where Revocation Would Have Occurred at Common Law.

The interpretation of Title 19, Section 103 of the D. C. Code (1940) was last before this court in *Pascucci v. Alsop*, supra. That was a case where both marriage and the birth of issue occurred after execution of a will which left the bulk of the testator's property to his sisters in Italy. These *two* events occurring after the will operated as an implied revocation at common law (see page 4, supra). Nevertheless, the argument was advanced, on the authority of *Morris v. Foster*, 51 App. D. C. 238, 278 Fed 321, certiorari denied 259 U. S. 582, 66 L. Ed. 1074, that the statutory prohibition was absolute, and that there could be no revocation in the District of Columbia except by the methods enumerated in the Statute. This proposition was rejected and the will held to have been revoked. The court interpreted the statute in accordance with the established construction by the common law courts. In so doing, it said, on page 355:

“Accordingly in ascertaining its meaning we are to be guided by the construction of that provision of the Statute of Frauds by the courts of England and the like provision by the courts of Maryland.”

and again, on page 357:

“In England, as we have seen, at the time of the Revolution, the Statute of Frauds, which is today, and by adoption always was, the law in the District of Columbia, had been held as not affecting the then existing common law that marriage and the birth of issue taken together amount to an implied revocation of a previously executed will of the husband and father.”

VI. Birth of a Child Does Not Revoke a Will Made After Marriage in the District of Columbia.

Applying the reasoning of *Pascucci v. Alsop*, supra, to the facts in the instant case, the result is inescapable that the will was not revoked by the birth of testator's son. So held the common law courts prior to the Revolution, and so held the Maryland courts until the case of *Karr v. Robinson*, supra, in 1934.

Pascucci v. Alsop has the effect of determining that Section 19-103 of the D. C. Code (1940) does not prevent the operation of the common law rule in the District of Columbia, and that the common law rule must be read into the statute. It is only by this reading of the common law rule into the statute that the Court justifies any revocation of wills other than by the methods expressly prescribed in the Code. Without adherence to the common law rule, there is no basis whatsoever for an interpretation of the statute broader than its literal terms. Therefore, in the absence of express legislation on this subject, the rule in this jurisdiction can be no different from the common law rule. The mere birth of issue to the testator after the execution of his will leaves the legal effect of the instrument unimpaired.

The appellant herein is in effect asking this Court to decide this case in accordance with statutes of other jurisdictions. The appellee relies on the statute which is the law of this jurisdiction, and not on the multitude of statutes which the Congress might have passed, but did not.

VII. Departure From the Common Law Construction of the Sixth Section of the Statute of Frauds Would Defeat the Legislative Intent and Inject Confusion and Uncertainty in the Law of Wills in the District of Columbia.

At the time that Congress re-enacted the Sixth Section of the Statute of Frauds in the District of Columbia the statute had a known and settled construction. The words meant a particular thing. If the Congress had not ap-

proved that construction, it would have passed a different statute. To construe the words now so as to allow the birth of a child to constitute an implied revocation within the statute would be placing a new and different interpretation on this section, and therefore defeating the legislative intent. It would create a new method of revocation. If the Congress had intended such a result it would have presumably passed a different statute, as was done in various of the states to change the common law rule on this subject.

To arrive at such result contrary to the common law and accepted interpretation of the Statute of Frauds without the guidance of a statute prescribing the extent of deviation from the common law would be to inject a serious element of confusion and uncertainty in this important branch of the law. So long as this Court stands fast on the common law interpretation of this historical statute, testators will know under what circumstances they need to make new wills. But if this Court were here to say that birth of a child served to revoke a will, it would be a matter of speculation as to what other circumstances might also be considered by this Court to revoke a will. This Court would undoubtedly be called upon to resettle the effect of other circumstances that did not revoke a will at common law, or which were never decided at common law, since they were more remote than changes which had been held not to revoke a will. No one could predict with certainty, without bringing the matter to this Court, whether revocation occurred by the mere marriage of a man after making his will, or whether the birth of a cousin or a grandchild, or the death of an uncle or a brother or a parent might not also revoke the will. There would be no assurance for the many people who have had family changes by death in these last few years whether or not these changes had been such as to cause a revocation of their wills.

In *Karr v. Robinson*, supra, the court, at page 380, talks of the moral obligation due the child by the parent. Moral obligation is the cornerstone of its decision. It is significant that the Maryland legislature saw fit to amend the statute,

thereby specifying what "moral obligations" it wished to be sufficient for the revocation of wills. It is said, in Section 508 of 1 Page, *op. cit. supra*, with regard to this idea of new moral duties revoking a will:

"... If this doctrine were applied literally, almost every will which had been executed for any length of time would be revoked; and the courts would be driven to speculate upon the probable effect, on a prior will, of each and every change in domestic relationships and surrounding circumstances."

Under this concept of revocation by new moral obligations, it would indeed be an accomplishment for a testator ever to place himself in a position to die with a valid will outstanding.

Much has been said about the policy in favor of revoking wills because of the birth of issue after their execution. If there is in fact such a policy, it is a matter for the Congress to carry into effect by the enactment of a statute which will specifically provide the circumstances under which a will shall be revoked. The wisdom of such policy is in any event dubious, for it would seem that if a man is prudent enough to make a will at all, he will be prudent enough to change its provisions if his situation is altered so that he later desires a different disposition. In the case at hand, it is certainly as reasonable to suppose that the testator, who had left his entire estate to his wife, reconsidered his will and determined that his son would be best cared for by leaving all to his wife, as to suppose that he would have made a different disposition had he considered the matter anew. Revocation would defeat the testator's intention in cases such as this more often than it would effect such intention.

CONCLUSION.

It is submitted that the common law, the plain language of the statute, the time-honored interpretation of this statute, and the necessity for certainty all require an affirmance of the ruling of the District Court, that the mere birth of issue does not effect revocation of a will made after marriage in this jurisdiction.

WILLIAM L. OWEN,
Munsey Building,
Washington 4, D. C.,
Attorney for Appellee.

